

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 NAGENDRA TIRUMALI, PARIMALI
5 TIRUMALI, KATELAND WELLS, TONY
6 MILHIZER, CONNY KIENER, GOEFF
7 LAVEAR, JOYCE LAVEAR, EIKO POLITZ,
8 WES ROSS, DOROTHY ROSS, GAIL
9 INGALSBE, RUSS CARSON and
10 ESTHER TOLLS,
11 *Petitioners,*

12 vs.
13

14 CITY OF PORTLAND,
15 *Respondent.*
16

17 LUBA No. 2000-005
18

19
20 JERRY L. WARD, NANCY A. WARD,
21 NAGENDRA TIRUMALI, PARIMALI
22 TIRUMALI, KATELAND WELLS, TONY
23 MILHIZER, CONNY KIENER, GOEFF
24 LAVEAR, JOYCE LAVEAR, EIKO POLITZ,
25 WES ROSS, DOROTHY ROSS, GAIL
26 INGALSBE, RUSS CARSON and
27 ESTHER TOLLS,
28 *Petitioners,*

29 vs.
30

31 CITY OF PORTLAND,
32 *Respondent,*
33

34 and
35

36 LINDA GAETH and STEVEN Y. ORCUTT,
37 *Intervenors-Respondent.*
38

39 LUBA No. 2000-007
40

41
42 DAVID JUBITZ, MARY JUBITZ, MARY LOU
43 STRIBLING, DONALD BERG, CAROLE A. COOKE,
44 THOMAS MALLOY, ELEANOR MALLOY,
45 JEFFREY M. LANG and RAMONA SVENDGARD,
46 *Petitioners,*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

vs.

CITY OF PORTLAND,
Respondent,
and

LINDA GAETH and STEVEN Y. ORCUTT,
Intervenors-Respondent.

LUBA No. 2000-018

ORDER

This consolidated appeal is before us on remand from the Court of Appeals. *Tirumali v. City of Portland*, 37 Or LUBA 859, *rev'd and rem'd* 169 Or App 241, 7 P3d 761 (2000), *rev den* 331 Or 674 (2001). In accordance with our April 20, 2001 order, we now resolve petitioners' record objections. The city has also renewed and supplemented the portion of its prior motion to dismiss that we did not reach in our remanded final opinion. We deny that renewed motion to dismiss below.

RECORD OBJECTIONS

On February 22, 2000, and March 9, 2000, petitioners objected to the record filed by the city in this consolidated appeal.¹ In our April 20, 2001 order, we allowed the city 14 days to respond to the record objections. We understand the city to take the position in its May 4, 2001 response that it has already submitted all the documents that it has in its possession in this matter. However, the city also states "the City does not object if petitioners submit copies of said records for inclusion in the LUBA record." Respondent's Response to Record Objections 2.

To the extent the city's statement is an invitation to LUBA to allow petitioners to submit a supplemental record, we decline the invitation. Only the city may submit the record

¹The record in LUBA Nos. 2000-005 and 2000-007 was received by LUBA on February 8, 2000. In its motion to dismiss LUBA No. 2000-018, the city indicated that it relied on the record in LUBA Nos. 2000-005 and 2000-007 for all three appeals, and the city has not filed a separate record in LUBA No. 2000-018.

1 in this matter. We treat the city's statement as a concession that the record may be
2 supplemented to include the documents identified in petitioners' record objections, to the
3 extent those documents can be located.

4 In their record objections, petitioners indicated that they were attaching copies of
5 some documents. However, no copies of documents were attached to the record objections
6 that were filed with LUBA. For other objections, petitioners indicated that they had copies
7 of the documents in their possession and were willing to provide those documents to the city.
8 Petitioners shall have until July 13, 2001 to provide the city with copies of any documents
9 identified in their previously filed record objections that they wish to be submitted as part of
10 the record.² On or before July 27, 2001, the city shall file a second supplemental record
11 composed of any such documents that petitioners provide to the city.³

12 **RENEWED MOTION TO DISMISS**

13 The decisions challenged in this consolidated appeal include: (1) an August 2, 1999
14 building permit (LUBA No. 2000-005), (2) a December 21, 1999 letter concerning that
15 August 2, 1999 building permit (LUBA No. 2000-018), and (3) a January 3, 2000 building
16 permit (LUBA No. 2000-007).⁴ The city asks that we rule on the part of its original motion
17 to dismiss that we did not reach in our prior decision. The city also advances a new
18 argument in support of its motion to dismiss, and submits a supplemental record to support
19 that motion to dismiss.⁵

²On June 4, 2001, petitioners' attorney advised the Board that he would be out of his office between June 11, 2001, and the end of June and requested that any deadlines established by the Board accommodate that absence. The July 13 deadline is set to allow petitioners two weeks after their attorney's return to gather and provide the documents to the city.

³If petitioners do not provide copies of the disputed documents to the city on or before July 13, 2001, the city may advise LUBA of that circumstance, and we will issue an order settling the record.

⁴The August 2, 1999 building permit and the January 3, 2000 permit concern the same dwelling that is the focus of the dispute in these appeals.

⁵Petitioners contend that documents included in the Supplemental Record are "extra-record material." Petitioners' Opposition to Portland's Renewed Motion 2. However, petitioners do not object to the supplemental record. *Id.* Because we allow the supplemental record, it is not necessary to consider the city's

1 **A. November 23, 1999 Petition to the City**

2 The notice of intent to appeal the August 2, 1999 building permit was filed on
3 January 7, 2000. In that appeal, petitioners contend the city improperly issued the disputed
4 building permit without first providing a public hearing. Based on the city’s failure to
5 provide a hearing, petitioners argue the 21-day deadline for appealing the decision to LUBA
6 begins on the date each petitioner received “actual notice” or “knew or should have known of
7 the decision,” depending on whether the petitioner was entitled to notice of the required
8 hearing.⁶ ORS 197.830(3). As a consequence of the Court of Appeals’ decision in this
9 matter, petitioners are correct about the applicability of ORS 197.830(3). In the notice of
10 intent to appeal, petitioners allege that they never received notice of the building permit and
11 learned of its existence less than 21 days before the notice of intent to appeal was filed. If
12 that allegation is true, LUBA No. 2000-005 was timely filed under ORS 197.830(3).⁷

13 The city’s prior motion to dismiss included an allegation that LUBA No. 2000-005
14 should be dismissed as untimely filed in the event ORS 197.830(3) applies. In support of this
15 allegation, the city argued that the signatures of several of the petitioners appear on a
16 November 23, 1999 petition to the city expressing concern about houses being constructed in

request that we consider the documents in the supplemental record pursuant to OAR 661-010-0045, which allows LUBA to consider evidence outside the record in certain circumstances.

⁶ORS 197.830(3) provides:

“If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

“(a) Within 21 days of actual notice where notice is required; or

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

⁷There are a number of different petitioners in these consolidated appeals. It is not always clear whether ORS 197.830(3)(a) or (b) applies to particular petitioners. We assume for purposes of the following analysis that ORS 197.830(3)(b) applies, and the relevant legal question is whether petitioners knew or should have known of the decision.

1 a manner that blocks the views of existing houses. Record 12-17. That petition apparently
2 was submitted in response to construction of the house that is disputed in this appeal. We
3 understand the city to suggest that this petition is sufficient to show that those petitioners
4 knew of the August 2, 1999 building permit decision more than 21 days before the notice of
5 intent to appeal in LUBA No. 2000-005 was filed on January 7, 2000.

6 Petitioners respond, and we agree, that there is nothing about the November 23, 1999
7 petition or the signature of some of the petitioners on that petition that reasonably suggests
8 that the persons signing the petition were aware of the August 2, 1999 building permit or the
9 city's decision concerning measurement of building height that is expressed in that building
10 permit.

11 **B. 1995 Adjustment Decision**

12 In 1995, the owner of the subject property sought an adjustment to allow construction
13 of a house on the property that deviated from zoning ordinance requirements in four ways.⁸
14 The property owner sought approval for a house that exceeded the allowable building height
15 by 6.5 feet, two fence height adjustments and a deck that encroached in the building setback
16 area. The city argues that several petitioners opposed the request and received written notice
17 of the city's decision that ultimately denied the part of the application that requested a
18 building height adjustment.

19 Like petitioners, we do not see how knowledge of an August 2, 1999 building permit,
20 a December 21, 1999 letter and a January 3, 2000 building permit could logically be imputed
21 to those petitioners who participated in the 1995 adjustment proceedings or received notice
22 of that 1995 decision, on the basis of those prior proceedings. The decisions challenged in
23 these three appeals all came years *after* the 1995 adjustment decision. The 1995 adjustment

⁸Under the city's zoning ordinance, an adjustment is a type of variance that allows development to deviate from zoning ordinance requirements in certain circumstances.

1 proceedings and decision could not have provided constructive notice of subsequent
2 decisions.

3 The city suggests that the 1995 adjustment decision, rather than one or more of the
4 decisions challenged in these appeals, is actually the decision that approved the proposed
5 height of the disputed dwelling. We understand the city to suggest that the present appeal is
6 therefore properly viewed as either a belated or collateral attack on the 1995 adjustment
7 decision. However, the city makes no attempt to explain how a 1995 decision *denying* the
8 property owner's request for permission to build a proposed house that exceeded applicable
9 zoning height limits could possibly have the legal effect of *approving* construction of a house
10 that was shorter than the house that was proposed in 1995. At most, the 1995 adjustment
11 decision suggests that a request for a building permit to build a house that was 6.5 feet
12 shorter than the one that was proposed in 1995 *would be approved* if such a building permit
13 were sought. The 1995 adjustment decision does not show that LUBA No. 2000-005, 2000-
14 007 or 2000-018 was untimely filed.

15 The city's motion to dismiss is denied.

16 **REQUEST TO DEPOSE PETITIONERS**

17 The city also requests permission to depose petitioners to determine when they
18 received notice of the 1995 adjustment decision. Because we have already determined that it
19 does not matter whether petitioners knew of the 1995 adjustment decision or when they may
20 have learned of that decision, no purpose would be served by granting the city's request.

21 **CONCLUSION**

22 The city has not demonstrated that this appeal should be dismissed. Consistent with
23 our ruling on petitioners' record objections, the city shall file a second supplemental record
24 not later than July 27, 2001.

25 Dated this 26th day of June, 2001.

26
27

1
2
3
4
5

Michael A. Holstun
Board Member